### d. The Commission Failed Repeatedly To Correct Minorities' Poor Access To Quality Technical Facilities

Not only have minorities secured few facilities, those they did secure were usually technically inferior. For years minorities have resided on the inferior side of what we call the "Analog Divide," which preceded the digital divide by two generations. Born of Commission policies that denied minority owned companies a chance to break into radio until well after the most valuable facilities were already licensed to Whites, the Analog Divide relegated minorities disproportionately to high-band low power AMs and low-tower low power FMs.[179/] Even today, as our research demonstrates, minorities continue to be burdened by inferior technical facilities -- a vestige of the days when Commission policies prevented minorities from participating in media ownership while others were allowed to feast on the finest frequency allotments available.[180/] Nonetheless, the Commission has repeatedly refused to do anything that might improve minority access to higher quality technical facilities.

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179/ As explained in Market Entry Barriers, supra, at 116:

> [w]hether it was late market entry...insufficient funds for the purchase of larger market licenses, or the perception of brokers and sellers that small businesses, especially minority businesses, couldn't afford the more powerful signal stations, small, minority- and women-owned businesses frequently ended up with inferior properties....we found this with minority-owned businesses more than any other demographic group.

180/ See Consolidation and Minority Ownership, supra, at 15-18 (finding that while there is no longer a racial disparity in AM stations' power levels, minority owned AM stations still tend to occupy the less desirable higher frequency end of the band. Furthermore, minority owned broadcasters are more likely than nonminority owned broadcasters to own Class A FM stations.)

The Commission repeatedly refused to bridge the Analog Divide through its spectrum management or structural regulatory authority. Whenever it refused to act, it invariably pointed to the tax certificate, distress sale and comparative hearing policies as alternate means to promote minority ownership.181/ But with these policies repealed or eviscerated, the only tools left to promote minority ownership are spectrum management, the structural

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181/ See, e.g., Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Memorandum Opinion and Order on Reconsideration), 4 FCC Rcd 5102, 5104 ¶19 (1989) (minorities "would continue to enjoy a preference or qualitative enhancement in any comparative hearing proceeding that arose as a result of the filing of a competing application for use of a foreign clear channel frequency to the extent minority ownership was integrated into the overall management of the station"); Clear Channels Repeal, 102 FCC2d at 558 (a "sounder approach" than eligibility criteria is to use distress sales and tax certificates to promote minority ownership.)

This refrain of reliance on the minority ownership policies also characterized various Commission regulatory misadventures outside the spectrum management field. In Deregulation of Radio (NPRM), 73 FCC2d 457, 482 (1979), the Commission reassured the public that "[e]fforts to promote minority ownership and EEO are underway and promise to bring about a more demographically representative radio industry." In adopting its ultimate rules in Deregulation of Radio, the Commission held that "it may well be that structural regulations such as minority ownership programs and EEO rules that specifically address the needs of these groups is preferable to conduct regulations that are inflexible and often unresponsive to the real wants and needs of the public." It explicitly concluded that the minority ownership policies and EEO rules, rather than direct regulation of broadcast content, were the preferable means to achieve diversification. Id., 84 FCC2d at 977. See also Top 50 Policy Repeal, supra, 75 FCC2d at 599 (Separate Statement of Chairman Charles Ferris); Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments (Second Report and Order), 101 FCC2d 638, 645 ("Implementation of Docket 80-90"), recon. denied, 59 RR2d 1221 (1985), aff'd sub nom. NBMC v. FCC, 822 F.2d 277 (2d Cir. 1987); Clear Channels Repeal, supra, 102 FCC2d at 558; cf. 1992 Radio Rules, supra, 7 FCC Rcd at 2769-70 ¶¶26-29 (relying on minority ownership policies to further diversification goals, even as the Commission deleted one of those policies, the Mickey Leland Rule.)

rules, and indirectly and to a far lesser extent, what might come to remain of the EEO Rule.

After the D.C. Circuit's 1975 decision instructing the Commission to consider the effects of its spectrum management policies on minority ownership,[182] the Commission issued only a handful of decisions that followed the court's lead.[183] Thereafter, the Commission has seldom been at a loss for reasons not to narrow the Analog Divide. When it lacked reasons, it simply disregarded the minority entrepreneurs or civil rights groups' pleadings and said nothing at all. In Docket 80-90,[184] in the

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182/ Garrett, supra.

183/ Atlass Communications, Inc., 61 FCC2d 995 (1976) (granting AM nighttime coverage waiver to promote minority ownership); Hagadone Capital Corp., 42 RR2d 632 (1978) (to promote minority ownership, Hawaiian AM station's nighttime authority petition was removed from the processing line and afforded expedited consideration); Clear Channels, supra, 78 FCC2d at 1368-69 (adding minority ownership as a criterion for acceptance of certain applications for new service on the domestic Class I-A Clear Channels, only to repeal them five years later in Clear Channels Repeal, supra.)

184/ The Commission considered minority needs when it created 689 new FM authorizations in Docket 80-90. Modification of FM Rules, supra, 94 FCC2d at 159 n. 10. However, it refused to dedicate spectrum for minority ownership, preferring instead to rely on the comparative process. Id. at 179. Soon afterward, when it established comparative criteria for the Docket 80-90 stations, the Commission diluted the previously available enhancement for minority ownership by authorizing a "daytimer preference" -- on the startling assumption that operating during daylight hours renders an applicant inherently as likely to promote diversity as minorities. Implementation of Docket 80-90 supra, 101 FCC2d at 647-49. Commissioner Rivera accurately characterized the weight of the daytimer preference -- which incorporated a "substantial" local ownership credit -- as so heavy that "it will be almost impossible for any newcomer - minority or non-minority - to prevail against a qualifying daytimer." Id at 653 (Dissenting Statement of Commissioner Henry M. Rivera). Given the Commission's failure to design Docket 80-90 to promote diversity, it is no wonder that Docket 80-90 is seldom regarded as a great success in promoting minority ownership.

9 kHz proceeding,185/ in the Domestic Clear Channel proceeding,186/ in the Foreign Clear Channel proceeding,187/ in the AM expanded

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185/ 9 kHz Channel Spacing for AM Broadcasting (Report and Order), 88 FCC2d 290, 314-16 (1981) ("9 kHz Spacing") (Commissioners Jones and Fogarty dissenting) (preferring minor cost savings to owners of 10 kHz per channel digital receivers in luxury automobiles to the creation of approximately 400 new AM stations urgently needed by minorities.)

186/ In Clear Channels Repeal, supra, 102 FCC2d at 558, the Commission repealed the minority and noncommercial eligibility criteria in Clear Channels, holding that a "sounder approach" than eligibility criteria is to use distress sales and tax certificates to promote minority ownership. Only thirteen minority owned stations had been created under this two-year old policy. Id. at 555.

187/ Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Report and Order), 101 FCC2d 1, 6 (1985) ("Foreign Clear Channels"), recon. granted in part, 103 FCC2d 532 (1986), reversed in part, NBMC v. FCC, 791 F.2d 1016, 1022-23 (2d Cir. 1986), on remand, Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Further Notice of Proposed Rulemaking), 2 FCC Rcd 4884 (1987), Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Second Report and Order), 3 FCC Rcd 3597, 3599-3600 ¶¶19-23 (1988) ("Foreign Clear Channels Second R&O"), recon. denied, 4 FCC Rcd 5102, 5103-5104 ¶¶16-20 (1989) (eliminating minority eligibility criteria on the Foreign Clears, on the theory that minorities can always apply to occupy other vacant spectrum.) Dissenting in Foreign Clear Channels, supra, 101 FCC2d at 30-31, Commissioner Rivera charged that the Commission was

> backing away from our commitment to encourage minority ownership and noncommercial use of [40 potential new stations] without any record basis for doing so....The key to this riddle of the reversal without reasons is that Section 73.37(e) helps minorities (among others). For that reason, the majority is unwilling to continue the existence of this rule section. It is reluctant to explain its motivation for rejecting Section 73.37(e)(2) because it would have an insurmountable task justifying that decision when the problem of underrepresentation of minorities in the broadcast industry is so far from being resolved (emphasis in original, fn. omitted).

band proceeding,188/ in the 1992 Cable Act Implementation proceeding,189/ the Satellite Digital Audio Radio

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188/ In deciding to give all of the expanded band to incumbents and none to minority new entrants, the Commission was quite brazen in articulating its regulatory priorities: "reserving even one channel for [minority, female and educational broadcasters'] exclusive use would assure a 10% decrease in expanded band resources dedicated to interference and congestion reduction." Technical Assignment Criteria for the AM Broadcast Service (Report and Order), 6 FCC Rcd 6273, 6307 ¶111 (1991) ("Expanded Band Report and Order"), recon. granted in part and denied in part, 8 FCC Rcd 3250, 3254 ¶¶36-37 (1993) ("Expanded Band Reconsideration Order") (subsequent history omitted) (permitting only incumbents to colonize the AM expanded band (1605-1705 kHz) and refusing to adopt minority ownership incentives for occupancy of the band, even though minority ownership had been among the primary justifications for the band's expansion in the Commission's planning for the 1979 WARC and the U.S. delegation's advocacy presented at the WARC, where the band was authorized.) The Expanded Band Report and Order failed to acknowledge the existence of, much less respond to, the extensive comments of the NAACP, LULAC and the National Black Media Coalition on this issue; the organizations weren't even listed in the Appendix as commenters. Id. at 6344-47. When the organizations sought reconsideration, advancing a less sweeping proposal, the Commission held that the new proposal "should have been submitted earlier as a comment in response to the NPRM" -- that is, as part of the same initial comments the Commission had disregarded! Adding insult to this injury, the Commission went on to justify its refusal to adopt minority incentives by claiming that it had "address[ed] the need to increase opportunities for minority ownership" when it adopted Revision of Radio Rules and Policies, 7 FCC Rcd 6387 (1992) ("1992 Radio Rules - Reconsideration"). Expanded Band Reconsideration Order, supra, 8 FCC Rcd at 3261 ¶37. Actually, 1992 Radio Rules - Reconsideration was the decision that affirmed the Commission's preference for additional consolidation of radio ownership in spite of minority groups' (accurate) prediction that more consolidation would severely inhibit minority ownership.

189 Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 (First Report and Order), 8 FCC Rcd 3359 (1993) (failing even to acknowledge the existence of extensive comments by the Caribbean Satellite Network ("CSN"), much less CSN's arguments for (or any other discussion of) policies to foster minority ownership of cable networks. CSN, which had 1,500,000 subscribers, was the only minority-owned cable channel, besides BET, that had ever launched U.S. operations.)

proceeding[190] and the digital audio proceeding,[191] the Commission refused to take steps to bridge the divide between White ownership and minority ownership while prematurely repealing modest remedial measures. The Commission behaved as though Garrett never happened.

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190 Responding to Rules and Policies for the Digital Audio Radio Satellite Service (Notice of Proposed Rulemaking), 11 FCC Rcd 1 (1995), MMTC urged the Commission to set aside channels to provide access to minority entrepreneurs. Comments of MMTC in IB Docket No. 95-91 and GEN Docket No. 90-357 (filed September 15, 1995). The Commission refused, holding that it had "relied on the representations of [the four] satellite DARS applicants that they will provide audio programming to audiences that may be unserved or underserved by currently available audio programming." Rules and Policies for the Digital Audio Radio Satellite Service (Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking), 12 FCC Rcd 5754, 5791 ¶90 (1997). Thus, nonminority entrepreneurs' promise that they will offer minority-oriented formats trumped minority entrepreneurs' own proven record of diverse programming. This paternalistic holding was a radical departure from the Commission's historic commitment to minority ownership as a means of advancing diversity. (Fortunately, and to their credit, XM and Sirius kept their promises. See p. 40 n. 74 supra.)

191/ Minority ownership was nowhere mentioned in Establishment and Regulation of New Digital Audio Radio Services (Notice of Inquiry), 5 FCC Rcd 5237 (1990) ("DARS NOI"), even though the Notice focused on providing spectrum for incumbents and for public broadcasters and inquired into the need for structural ownership restrictions. Id. at 5238 ¶11 and 5239 ¶14. Responding to the DARS NOI, four national civil rights organizations filed extensive comments and reply comments, along with an extensive study detailing the level of minority demand for DAB facilities by market. Comments of the NAACP, LULAC, National Hispanic Media Coalition and National Black Media Coalition in GEN Docket No. 90-357 (filed October 12, 1990); Reply Comments of the NAACP, LULAC, National Hispanic Media Coalition and National Black Media Coalition in GEN Docket No. 90-357 (filed January 7, 1991). The Commission neglected to mention, much less rule on the civil rights organizations' proposals or their demand study, or put the minority ownership issue out for comment in subsequent DAB proceedings. Establishment and Regulation of New Digital Audio Radio Services (Notice of Proposed Rulemaking and Further Notice of Inquiry), 7 FCC Rcd 7776 (1992) ("DAB NPRM"). The DAB NPRM said nothing about minority ownership.

### e. The Commission Failed To Prevent Employment Discrimination

The Commission also failed to thoroughly and reliably implement regulations intended to prevent discrimination. In 1969, the Commission adopted a rule barring discrimination by its licensees and requiring them, inter alia, to recruit minorities.192/ But in the 29 years during which the rule was in effect, the Commission barely enforced it. Only fourteen stations ever went to hearing on allegations of discrimination, and not one ever lost a license for race or gender discrimination. As MMTC and others have extensively documented, enforcement of the EEO rule was spotty at best.193/

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192/ Nondiscrimination in the Employment Practices of Broadcast Licensees, 18 FCC2d 240 (1969) (adopting 47 C.F.R. §73.2080) ("Nondiscrimination - 1969").

193/ This history is summarized in the Comments of Civil Rights Organizations in MM Docket Nos. 96-16 and 98-204 (Broadcast and Cable EEO), filed March 5, 1999, at 114-116 (available from undersigned counsel on request). See also Market Entry Barriers, p. 100, quoting Rev. Everett Parker, Treasurer of MMTC and founder of the Office of Communication of the United Church of Christ ("UCC"):

> [With] the first EEO rules, when EEO reports were turned in, the FCC didn't even open them. They threw them into boxes and took them into the library and stored them...They never [] examined [radio and television] stations in detail for their [EEO] performance even though they are supposed to. And you know, license renewal has always been a farce....the staff at the FCC certainly did not want to be bothered with these hundreds and hundreds of reports and analysis....
>
> In the end, since [UCC was] issuing [EEO] analyses every year we made a deal with the then chairman...(H)e and I made an agreement that [we] would do the analysis and would have the figures. And as long as he was Chair everything was just wonderful.

(n. 193 continued on p. 100)

This history establishes five key points.

First, the Commission was an active co-conspirator with state governments in two kinds of schemes to prevent minorities from enjoying broadcast education. The FCC awarded broadcast licenses to segregated institutions, and failed to enaensure that ostensibly "separate but equal" minority state institutions would secure broadcast licenses. Even today, the Commission does not ensure that states operating dual systems of higher education, designed primarily for Whites and African Americans respectively, are apportioning facilities and opportunities equally throughout the institutions they administer.

Second, the Commission routinely granted and renewed licenses of commercial broadcasters that discriminated, and in doing so openly embraced state segregation laws a year after Brown. It continued these policies into the 1970s, thereafter adopting but rarely enforcing a rule to prevent employment discrimination.

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193/ (continued from p. 99)

> But then, of course, the Reagan FCC came along and after that, you know, they just said they weren't going to enforce the EEO rules and the hiring and promoting of minorities and women went down again....

Henry Rivera, Chair of MMTC and a commissioner from 1981 to 1985, added that during his term on the FCC "one of the things that happened that hurt a lot was the Commission's decision basically to stop enforcing its EEO policies... [the then Chairman] thought that this was a bad thing to do, that it was not appropriate for the government to be sticking its nose in enforcing broadcasters to hire minorities...That hurt a lot because [minority and women employees] are your farm team, basically. These are the folks that you look to in the future to get into ownership.... Id. at 100-101.

Third, although it knew that the exclusion of minorities from broadcast education denied minorities an opportunity to obtain broadcast experience or a past broadcast record, the Commission built these criteria into its comparative licensing policies anyway. The Commission did not repeal a related, overbroad financing rule until 1981. Thereafter, the Commission continued to award licenses for construction permits through a system designed to replicate and reinforce the effects of past discrimination against minorities, and to subsidize and reward those who secured their broadcast experience and operating records during the period when minorities were excluded.

Fourth, the Commission repeatedly refused to take steps to correct minorities' poor access to high quality technical facilities, even though the Commission's own misbehavior was a proximate cause of this poor allocation of facilities.

Fifth, the Commission failed to enforce regulations designed in a small way to prevent discrimination.

Since the Commission's misconduct in broadcast regulation -- financed by the taxpayers -- have deeply affected constitutionally protected rights, remedial steps are justified.[194/] Remediation of government-assisted discrimination is a compelling government

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194/ Croson, supra, 488 U.S. at 492.

interest.[195] That interest is particularly compelling in light of the central role of the electronic mass media in maintaining social cohesion[196] and cultural vibrancy,[197] and indeed in sustaining

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195/ See discussion at pp. 71-72 supra.

196/ The socially unifying nature of mass communications was recognized in Waters Broadcasting Corp., 91 FCC2d 1260 (1982) ("Waters"), aff'd sub nom. West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (1984), cert. denied, 470 U.S. 1027 (1984). In Waters, the Commission awarded a decisionally significant minority enhancement to the ownership integration proposal of an African American woman who proposed to serve a nearly all-White community. The Commission held that "minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation." Id. at 1265. Thus, Waters validated the fact that communication between minorities and nonminorities, rather than just communication within a minority group, is an essential aspect of the diversity-promoting goal of the comparative hearing process. See also Dr. Martin Luther King Movement v. Chicago, 419 F.Supp. 667 (N.D. Ill. 1976) (emphasizing that African Americans' need for access to a White audience requires a municipality to permit a civil rights march in a White neighborhood).

197/ It is essential that cultural content be included with the scope of equal protection and due process in the media. Although the Commission's diversity jurisprudence has focused largely on informational, public affairs and instructional content, (see, e.g., NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976) and Deregulation of Radio, supra, 84 FCC2d at 975) it is cultural broadcast content which most influences and mediates social norms. The inclusion of culture among the elements of media content affecting due process or equal protection rights may be analogized to the inclusion of cultural (as well as athletic) activities in the scope of educational opportunities covered by desegregation decrees. Brown I held that education is "a principal instrument in awakening the child to cultural values." Id., 347 U.S. at 493. Courts have not wavered in requiring the integration of school bands and orchestras, sporting events and extracurricular clubs. See, e.g., Davis v. Board of School Commissioners of Mobile County, 393 F.2d 690, 696 (5th Cir. 1968) (declaring that failure to schedule games between all-Black teams against all-White teams "is no longer tolerable; the integration of activities must be complete.") Similarly, the Commission should not waver in including culture within the scope of content triggering due process or equal protection rights in the media.

our democracy itself.[198] Remediation of discrimination in the media is at least as important as remediation in public education -- a field in which the compelling nature of the government's interest is settled law.[199] As the Commission acknowledged when

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198/ Nobody seriously contends that the nation as we know it could survive long without free, over-the-air broadcasting. Over-the-air broadcasting, including both television and radio network, local and syndicated programming, has by far the greatest impact upon our society's educational, cultural and political development when compared to all other media outlets, because most people rely upon such programming as their primary source for information and entertainment. In fact, our system of product and service marketing, and our culture, are entirely dependent upon it. More important, our political system depends on it: Section 315 of the Communications Act presumes the existence of free broadcasting as a critical component of the democratic system. Red Lion, supra, 395 U.S. at 389. Thus, when the federal government was shut down in January, 1996, leaving only "essential" (e.g. National Security) employees on the job, the Mass Media Bureau was expected to maintain a skeleton staff to ensure that the nation's broadcasting infrastructure would continue to operate.

199/ The media, like education, is essential to the attainment or enjoyment of every element of civilized life in a modern democracy, including housing, health care, defense of one's civil liberties, and informed participation in the political process. See Blue Book, supra, at 4. What school desegregation jurisprudence tells us about the importance of public education can also be said about free broadcast media today. Public education has traditionally been recognized as vital to the "preservation of a democratic system of government." Brown I, supra, 347 U.S. at 493; see Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring). Further, public education is necessary to prepare individuals to be self-reliant and self-sufficient participants in society. Brown I, supra, 347 U.S. at 493.

it initially adopted the EEO Rule, "it has been argued that because of the relationship between the government and broadcasting stations, 'the Commission has a constitutional duty to assure equal employment opportunity.'"200/ No less can be said about media ownership. The Commission and the Courts have recognized -- sporadically but clearly -- that the Commission has authority to take remedial steps in the exercise of its spectrum management and licensing authority.201/ Consequently, in this proceeding, the Commission should accept the duty of aggressively bringing about the racial integration of broadcast ownership.

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200/ Nondiscrimination - 1969, supra, 18 FCC2d at 241. The Commission identified Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) ("Burton") as a citation which had been given in support of that proposition. Id. at n. 2. The party that made this argument in 1969 was the Department of Justice. Citing Burton, the Department argued that "the use of the public domain would appear to confer upon broadcast licensees enough of a 'public' character to permit the Commission to require the licensee to follow the constitutionally grounded obligation not to discrimination on the grounds of race, color, or national origin." Letter to Hon. Rosel Hyde from Stephen J. Pollak, Assistant Attorney General, Civil Rights Division, May 21, 1968, found in Petition for Rulemaking to Request Licensees to Show Non-Discrimination in Their Employment Practices, 13 FCC2d 766, 776 (1968). The Department was absolutely correct. Indeed, the case for federal enforcement of due process or equal protection rights in broadcasting is even stronger than the case for enforcement of those rights in Burton. Burton involved a luncheonette which (owing to its location in a municipal building) could not have existed absent state action, but which was not essential to the performance of the state's functions. Free broadcasting cannot exist absent state action, and it is essential to the performance of the state's functions.

201/ See Garrett, supra, and discussion herein at pp. 64-65 supra.

### 3. Minority Ownership Policies Promote Economic Competition

Regulation to promote economic competition could satisfy strict scrutiny. Minorities are often unable to compete effectively for reasons other than (or in addition to) the present effects of the government's own past involvement in discrimination. When a significant group is unable effectively to contribute its competitive acumen to the marketplace, the public may suffer by being denied the full range of products and services that the marketplace otherwise would provide.

Economic competition as a compelling interest justifying race-conscious programs is such a new concept that no reported FCC decision discusses this issue. Yet the impact of racial exclusion on competitiveness was well established by DOD's pioneering and highly successful work in promoting racial inclusiveness.202/ Developing the law and economics on this subject would be a worthy undertaking for the Commission.

In any industry, the irrational exclusion of any input to production distorts the marketplace, reduces the quantity and quality of outputs, drives up prices and leaves consumer demand unsatisfied. In the electronic media, a key input into production is the quality and diversity of the ownership pool, consisting of the companies whose management teams, business plans, talent and creativity are the basis for organizing and deploying all other

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202/ The Army's aggressive efforts to stay competitive by ending segregation and ensuring full integration at all levels is described in Charles C. Moskos and John Sibley Butler, All That We Can Be (1996).

inputs to production. The diversity of the ownership pool is an especially critical input in the radio industry, for which business creativity so often translates into ability to attract creative people to the line staff and manage them effectively. In a business whose product is the distribution of the fruits of talent, it is unsound economic policy to allow market imperfections to exclude or drive out anyone on a basis other than merit.203/

As we have shown, minorities control only a miniscule proportion of radio stations and industry asset value. Minority participation has been depressed by government action and inaction, as well as by societal discrimination. But whatever its causes, the resulting nonparticipation of minorities in ownership is inefficient as a means of organizing production in a business uniquely based on talent. Since talent is equally distributed throughout society, the nonparticipation of large sectors of society in the generation of production of the fruits of talent is inherently inefficient. Whether or not it is anticompetitive, it is macroscopically noncompetitive.

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203/ An argument can be made that this principle applies in industries like radio and television, journalism, movies, music, sports, medicine, education and law, each of which depend heavily on human talent -- but not necessarily in industries whose primary inputs in production are natural resources such as electricity. For example, in NAACP v. FPC, supra, the NAACP had asked the Court to find that EEO rules in the power industry would make that industry more competitive. The Court found the argument intriguing but the Court found that the facts did not demonstrate a nexus between minority employment and electric power generation sufficient to require the FPC to adopt an EEO rule similar to that in effect at the FCC. In dictum, the Court declared that the FCC's mandate to promote diversity justified its EEO regulations. Id., 425 U.S. at 670 n. 7. The Court left open the question of whether the FCC's EEO rule could have been justified as a means of promoting the competitiveness of the broadcasting industry.

Greater minority inclusion would strengthen the competitiveness of the radio industry in three ways. First, by enabling the minority owned segment of the industry to compete effectively in radio ownership, the Commission would bring about an increase in the number of radio stations which are operating successfully, staying on the air, and serving the public serving the public. Second, minority owned facilities would create jobs which would not exist but for minority entrepreneurs who are empowered to use their unique skills and backgrounds to compete in the marketplace. Third, new facilities owned by minorities and reaching heretofore underserved minority audiences have a net positive effect on the ability of advertisers to reach the entire public.

The Commission would serve itself well by engaging an economic consultant to develop the rigorous analysis needed to sustain a narrowly-tailored initiative to promote competition by fostering minority ownership.

### 4. Minority Ownership Policies Foster Viewpoint And Source Diversity

By promoting diversity of ownership, including racial ownership diversity, the Commission has sought to promote the broadcast of a diversity of opinions and information. In 1990, the Commission's interest in promoting diversity won the endorsement of five Supreme Court justices. The Court, in Metro Broadcasting, upheld two race conscious minority ownership incentive programs on the basis that these programs helped promote the broadcast of

diverse viewpoints.[204] However, it is uncertain whether today's Supreme Court would find this interest to be compelling, inasmuch as Metro Broadcasting was decided under the intermediate scrutiny standard five years before Adarand III established strict scrutiny as the standard for race conscious federal programs.[205] It is noteworthy, that in the broadcast employment context, a panel of the D.C. Circuit of the U.S. Court of Appeals, in dictum, has expressed its view that promoting broadcast diversity does not constitute a compelling governmental interest, but also suggested suggested that the FCC might be justified in promoting "inter-station" diversity", that is, a variety of different types of stations, including minority owned stations that might be more likely to be programmed for minorities.[206]

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204/ Metro Broadcasting, supra, 497 U.S. at 547. The two programs were (1) an enhancement for minority ownership in comparative hearings for broadcast licenses (see TV 9, supra) and (2) the distress sale policy, which provided financial incentives for the transfer of broadcast licenses, in hearing status, to minority owned firms (see 1978 Minority Ownership Policy Statement, supra). The Commission no longer conducts comparative hearings, and the distress sale policy has been used only twice since 1990.

205/ It is not clear that the diversity rationale would fail strict scrutiny. Adarand III only overruled Metro Broadcasting to the extent that it applied intermediate rather than strict scrutiny. See Adarand III, supra, 515 U.S. at 227.

206/ Lutheran Church, supra, 141 F.3d at 355 ("[i]t is at least understandable why the Commission would seek station to station differences[.]")

The Commission has long recognized that minority ownership is a valuable way to foster diversity of viewpoints.[207] The Courts[208] and Congress agree.[209] Extensive empirical

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207/ In 1960, the Commission first recognized that "service to minority groups" serves the public interest. 1960 Programming Statement, supra. The Commission has often recognized racial ownership diversity as a public good. See, e.g., Waters, supra, 91 FCC2d at 1264-1265 ¶¶8-9 (recognizing that a minority broadcaster could provide nonminorities with minority viewpoints they are unlikely to receive elsewhere.)

208/ Justice Brennan's majority opinion in Metro Broadcasting, supra, 497 U.S. at 580-82, concluded:

> [e]vidence suggests that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoints, especially on matters of particular concern to minorities...minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities.

209/ In 1982, Congress determined that "an important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities...it is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public." Communications Amendments Act of 1982 -- National Telecommunications and Information Administration, Pub. L. No. 97-259, H.R. Conf. Rep. 97-765 (1982) at 26. In 1993, Congress adopted 47 U.S.C. §309(i)(A)(3), which provided that

> for each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall include safeguards to protect the public interest in use of the spectrum by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including...businesses owned by members of minority groups, and women.

In 1997, when Congress repealed 47 U.S.C. §309(i)(A)(3) in favor of auctions, Congress again reiterated that minority ownership was an important objective in fostering minority telecom ownership. See 47 U.S.C. §309(j)(3)(B) (competitive bidding must result in dissemination of licenses among a wide variety of applicants including small businesses and businesses owned by minorities and women); 47 U.S.C. §309(j)(4)(c)(ii) (same with respect to assigning areas and bandwidths); 47 U.S.C. §309(j)(4)(i) (provision of spectrum based services).

research,[210] including research sponsored by the Commission,[211] documents that minority owned broadcasters offer viewpoints not provided elsewhere. The viewpoints of minorities -- including the diversity of views held within minority communities -- can enrich public discourse, reduce stereotyping and unify the nation.

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210/ These studies are collected in Comments of Consumers Union et al. in Cross-Ownership of Broadcast Stations and Newspapers (MM Docket No. 01-235 (Cross-Ownership of Broadcast Station and Newspapers) (filed December 3, 2001) at 53-54 ns. 87-89 (incorporated by reference). Additional studies are collected in the Comments of EEO Supporters (MMTC et al.) in MM Docket No. 98-204 (Broadcast and Cable Equal Employment Opportunity Rules and Policies) (filed March 5, 1999) at 166-171 (incorporated by reference).

211/ See Diversity of Programming, supra (finding that minority owned radio stations aired more racially diverse programming than did majority owned stations.)

## V. A New Regulatory Paradigm: How The Commission Can Promote Source Diversity, Format Diversity, Viewpoint Diversity, Competition, Economic Efficiency And Minority Ownership Simultaneously

### A. A Summary Of The Free Speech Radio Concept: How Channel Bifurcation Can Allow New Entrants And Platform Owners Both To Achieve Their Public Interest Objectives 212/

Traditionally, the debate over radio ownership limits has been between those favoring economic efficiency and those favoring diversity of content and ownership. Efficiency proponents favor unfettered consolidation; diversity proponents favor a halt to consolidation. This entirely predictable debate always produces rules that are more politically than empirically justified. Inevitably, these rules are inherently subjective and thus are difficult to defend in court.

To break this cycle of zero sum debate and arbitrary decisions that satisfy no one, we should stop asking "how many stations are

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212/ Our concept has its roots in the writings and musings of former FCC General Counsel and NTIA Director Henry Geller, George Washington University law Dean Jerome Barron, and Aspen Institute scholar Charles Firestone in the early 1970s. These thinkers, with contributions from Albert Kramer, Nolan Bowie, Frank Lloyd, Lew Paper, Andrew Schwartzman and others, developed the idea that public access to the mass media should be regarded as a First Amendment right and might be a more attractive or at least an alternative paradigm for regulation than direct oversight of content through means such as the Fairness Doctrine. The courts were unsympathetic, having refused to recognize access to broadcasting as a First Amendment right. See Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) and Smothers v. CBS, 351 F.Supp. 622 (C.D.CA. 1972); cf. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (print media). Nonetheless, we owe the thinkers who gave us the short-lived public access movement a profound intellectual debt. Our Free Speech Radio Concept begins where the public access movement left off: it would make station ownership the vehicle for access, and it would incentivize -- rather than force -- incumbent licensees to create these new ownership -- and thus access -- opportunities.

enough for one company" and instead ask: how can we achieve each legitimate communications policy objective at the same time?

MMTC sets out in this section just such a new paradigm, which will deliver value to each stakeholder in the radio industry -- platform owners, large and small broadcasters, religious and secular broadcasters, minority and nonminority broadcasters, and the listening public. It is not a "compromise." Instead, it is a new paradigm which uses Section 202(b)(2) of the Act to promote source diversity, format diversity, viewpoint diversity, competition, economic efficiency and minority ownership simultaneously.

We begin with the premise that at this time in our history, participation in the stream of communications must be deemed a fundamental right. A person cannot function in society anymore without access to information delivered over the radio. For most Americans, that means access to radio. Radio continues to be the most widely available, cost-effective mass medium.

In today's social and economic climate, the "larger and more effective use of radio in the public interest," 47 U.S.C. §303(g), is imperative and not a discretionary option.

Although our system of radio broadcasting surpasses any in the world, it is based on a piecemeal and outdated regulatory system:

1. It places decisionmaking authority over the dissemination of viewpoints in the hands of relatively few speakers.

2. It is profoundly underutilized for the transmission of news, public affairs, and many types of religious and secular expression.

3. It restricts the economic competitiveness of radio vis-a-vis other mass media.

4. It denies most new entrants an opportunity for access and ownership, thereby placing pressure on the Commission to crowd more low-power stations into the spectrum available for broadcasting.

5. It fails to remedy the consequences of the very long history of discrimination against minorities in ownership, and it has failed to prevent further discrimination.

6. It imposes prohibitive entry costs on religious broadcasters, who for the most part cannot observe marketplace conventions.

7. It fails to provide meaningful access for noncommercial speakers, none of whom is permitted to observe marketplace conventions.

8. It fails to maximize variety, also known as format diversity.

9. Finally, it imposes heavy regulatory costs and burdens on the Commission itself.

These deficiencies persist because radio regulation is premised on the invalid assumption that radio stations will serve the community's needs voluntarily. That dream has proven illusory after Deregulation of Radio.[213/] Voluntary public service in today's radio industry is limited because counterprogramming, in response to a competitor's duplication of one's format, often must result in the elimination of public service programming. Public service programming requires the expenditure of sunk costs over time. Thus, if a competitor duplicates one's format and forces one's station to be re-programmed, the costs that had been sunk into the public service programming must be written off. We refer to this phenomenon as the "Format Imperative."

Viewpoint diversity would logically be advanced by ownership diversity, but as noted earlier, few viewpoints are actually

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213/ 84 FCC2d at 968.

expressed over most radio stations anymore.[214] Attempts to diversify ownership are likely to diversify the content of what little speech we hear,[215] but ownership diversification can have only a very limited effect on the radio listening environment unless it results in the creation of a new programming marketplace that incentives speakers to actually engage in speech. That means that the Commission must regulate around the Format Imperative.

The Commission has few tools to promote viewpoint diversity:

- LPFM was a well intentioned symbol of free speech -- and we were proud to endorse it -- but LPFM will have limited practical usefulness. Even if third adjacents were not protected, LPFM still would not be heard in most communities or in most neighborhoods.

- Attempts to bring back indirect content regulation through ascertainment and program percentage guidelines would be doomed. They would inevitably pit government power against the marketplace, resulting in grudging, minimalistic public service offerings, such as a Sunday morning block of inexpensively produced, unattractive offerings.

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214/ To some extent, ownership consolidation has also diminished the number of providers of news and public affairs being heard over the radio. See pp. 13-19 supra. As noted above, owing to the Format Imperative, few stations have much incentive to produce nonentertainment programs irrespective of whether they have the resources to do so. Recall that local public affairs programming began to disappear with the (approximately) 1960-1975 transformation of radio into specialized formats, and most of what was left disappeared after radio programming was deregulated in 1981. By 1996, when radio ownership structure was substantially deregulated, there was little nonentertainment programming left. The Format Imperative may be a more significant determinant of viewpoint diversity in radio than ownership consolidation.

215/ The best current effort to diversify broadcast speech is the EEO Rule, which tends at least to ensure that what little speech we hear embeds a variety of viewpoints. Nonetheless, the power of EEO regulation to promote speech diversity is constrained by the powerful format-driven disincentives to broadcast any material quantum of viewpoint-based speech.

- The opposite approach -- complete programming deregulation -- would also fail because there is so little program regulation left to deregulate. The public would hardly notice the loss of the issues/programs list, whose retention perhaps serves the worthy purpose of immunizing the industry from having to pay spectrum fees, while accomplishing little else.

- Structural re-regulation -- that is, requiring superduopolies to divest their properties -- could be financially and operationally disruptive and could be unfair. Grandfathering would be racially regressive. 216/

- Structural deregulation would have some impact on format diversity (more hybrids but probably few new niche formats. 217/ However, raw structural deregulation cannot increase viewpoint diversity because it cannot change the Format Imperative that creates a disincentive for broadcasters to invest in nonentertainment programming. Indeed, by forcing out independent voices, raw structural deregulation would almost surely decimate viewpoint diversity.

Spectrum managers have only eight variables to manipulate: frequency, longitude, latitude, altitude, bandwidth, selectivity, power and time. Manipulation of the first seven would yield no appreciable increase in the number of allotments, and thus could do little to expand or diversify the speech we hear over the radio. Not much can be wrung out of the spectrum by manipulating station frequencies and geographic location, there being only so many move-ins the spectrum can bear. Bandwidth and selectivity cannot be manipulated until a new generation of receivers becomes available. Even then it would be politically difficult, as the 9 kHz Spacing debacle demonstrated. Station power levels are being manipulated somewhat through LPFM, but, as noted above, LPFM's influence will be limited or nonexistent in most markets.

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216/ See p. 46 supra.

217/ See Platform Size and Program Formats, supra, at 21-22.

That leaves the number of hours in the broadcast day as the only variable the Commission can use to promote viewpoint diversity. While the Commission cannot rewrite the Gregorian Calendar, it can split the atom known as the broadcast day, with surprisingly positive results.

As noted above, the Format Imperative creates the primary disincentive to produce quality or quantity nonentertainment programming. Except for a licensee that chooses a news/talk format, broadcasters with access to all 168 hours per week are unlikely to offer much nonentertainment programming. However, a licensee does not actually need "ownership"[218/] of all 168 hours to provide a competitive channel of entertainment.[219/]

Likewise, one desiring to provide nonentertainment programming does not need 168 hours a week in which to do so. Indeed, one does not need anything close to that number of hours. While most people can relax (and listen to music) for hours on end, few people can summon, for long consecutive periods of time, the level of attentive concentration required to contemplate an idea. For example, at least two millennia of experience shows that a religious service of two or three hours can inspire genuine

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218/ We use the term "ownership" of hours here in its economic sense rather than its regulatory sense. As shown infra, adjustments in hours of operation of two stations operating symbiotically on the same frequency would be premised on the existence of a very modest "market" in which a few of the broadcast hours available in a week could be sold by one of these stations to the other one, subject to Commission approval.

219/ For example, many cable channels do just fine with 120 hour per week schedules of entertainment and 48 hours per week of infomercials. See discussion at p. 126 infra.

spiritual devotion. An academic class seldom lasts more than two hours; perhaps that time span marks the limit of most people's ability to absorb knowledge efficiently. Only a few activities, such as jury duty or presiding over an FCC hearing, require a person to engage in concentrated, attentive thought for more than a few hours at a time -- and those activities are often perceived as punishment. The length of time that has proven most suitable for thoughtful contemplation of ideas in the television medium has proven to be sixty minutes.

An entertainment provider could do its job very well with (e.g.) 148 hours per week at its disposal, and a viewpoint provider (that is, one engaged in offering "free speech") could do its job very well with (e.g.) twenty hours per week at its disposal, which leads directly to this proposal:

> **The Commission would create a new class of "Free Speech Stations" having at least 20 non-nighttime hours per week of airtime, independently owned by a small disadvantaged businesses, and primarily devoted to nonentertainment programming. A Free Speech Station would share time on the same channel with a largely deregulated "Entertainment Station." A platform owner that bifurcates a channel to accommodate a Free Speech Station and an Entertainment Station could then buy another fulltime station under the provision of the Communications Act that allows for an exception to the eight station rule when a new station is created (47 U.S.C. §202(b)(2)). That additional fulltime station would also be bifurcated into a Free Speech and an Entertainment Station. In this way, a platform could grow steadily up to the limits allowed by competition analysis. Moreover, the number of voices and viewpoints heard by the public would grow exponentially, and minority ownership would get a much-needed boost. No new legislation would be required to accomplish all of this.**

Here are the highlights:

1. Creation of New Classification: "Free Speech Station".

A 168 hour per week "Traditional" Broadcaster/Station/Licensee would have the option of applying to the Commission to bifurcate certain channels. The Traditional Broadcaster making a "Bifurcation Election" would become an "Entertainment" Broadcaster/Station/Licensee, operating for no more than 148 hours per week (approximately 88%) of the airtime. The second licensee on that channel, operating with at least 20 hours per week such that no fewer than 20 hours falls between 6 AM and midnight, would be a "Free Speech" Broadcaster/Station/Licensee.220/

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220/ The numbers 148 and 20 are not cast in stone, and different numbers would need to apply to AM daytimers. See pp. 174-76 infra (suggesting that this kind of detail could best be resolved through a negotiated rulemaking.) Logical time blocs for a Free Speech Station could be 8-11 PM each evening all week, or 2 PM to midnight Saturday and Sunday. It is, however, essential that Free Speech Stations be assured at least 20 hours of operation during hours other than midnight to 6 AM. As the Commission has recognized, "[i]t would be difficult for us to conclude...that a licensee had acted reasonably if it had offered all of its issue oriented programming at times when it could not have been reasonably anticipated to be effective." Deregulation of Radio (Reconsideration), 87 FCC2d at 816 ¶42; see 47 C.F.R. §73.1740(a)(1) (the Commission does not count nighttime hours of operation in determining an AM or FM station's minimum operating hours.)

It is also essential that bifurcated hours be held to the same schedule from one week to another, to ensure that the Free Speech Stations build audience. For example, the Commission should not permit licensees to bifurcate channels just for the month of January. Radio is a week to week business, and community needs must be met on a year-round basis. See Deregulation of Radio (Reconsideration), 87 FCC2d at 820-21 ¶54 ("[w]hile we would not require the identical amount of issue responsive programming each week, we do not believe that relegating all such programming to a few months, to a few weeks, or even to a few days in an annual nonentertainment programming 'blitz' would be in the public interest...to allow otherwise would undercut the idea of a marketplace of ideas among the aggregate of stations[.]")